Office-Supreme Court, U.S.
FILED
OCT 4 1963
JOHN F. DAVIS, CLERK

No. 516

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

INTERSTATE LIFE & ACCIDENT INSURANCE COMPANY,
Petitioner,

vs.

RKO TELERADIO PICTURES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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MAY IT PLEASE THE COURT:

Petitioner prays that a Writ of Certiorari issue to the United States Court of Appeals for the Sixth Circuit to review a judgment entered in this cause on the 11th day of June, 1963, and an order overruling petition to rehear entered on the 16th day of July, 1963.

OPINIONS BELOW

The opinion of the District Court is reported at 201 F. Supp. 574, et seq. The opinion of the Court of Appeals dated June 11, 1963, is reported at 318 F. 2d 73, et seq. The opinion of the Court of Appeals dated July 16, 1963, is not reported.

Both of the opinions of the Court of Appeals are appended together with the opinion of the District Judge, Bailey Brown, which was rendered when respondent's motion for judgment notwithstanding verdict or for order granting new trial was overruled in all respects.

JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. A., Section 1254.

QUESTIONS PRESENTED.

1. In view of the prohibition of the Seventh Amendment to the United States Constitution and the applicable decisions of this Court, does a Federal Appellate Court, in reviewing a jury verdict for breach of contract, founded on substantial evidence, have the authority to substitute its finding of fact for that of the jury on the issue of what damages may be said to have been within the contemplation of the parties, and thereupon reduce the award of compensatory damages by 90%?

2. May a Federal Appellate Court, in reviewing a jury verdict for compensatory damages for breach of contract to deliver television advertising time, hold that the market value of such television time is not admissible when all applicable authority is to the contrary?

3. May a Federal Appellate Court, in reviewing a jury verdict for breach of contract, in effect, rewrite the contract itself so as to provide therein an option on the part of the party in breach whereby such wrongdoing party is relieved from its obligation to deliver the very thing called for by the contract?

CONSTITUTIONAL PROVISION INVOLVED.

This case involves a violation of the Seventh Amendment to the Constitution of the United States which is as follows:

> "In suits at common law, where the value in controversy shall exceed Twenty ($20.00) Dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the Rules of the common law."

STATEMENT OF THE CASE.

Petitioner, plaintiff below, brought a common law action for breach of contract against the respondent, the defendant below, which arose under Tennessee law, damages being sought for failure to deliver approximately one-third of the number of television spot announcements which respondent had agreed to deliver over its television station in Memphis, Tennessee, in exchange for petitioner's fully performed obligation to acquire land and build broadcasting facilities thereon for use by respondent for a period of ten years.

Jurisdiction was based on diversity of citizenship and the amount in controversy exceeding $10,000.00, exclusive of interest and costs.

Petitioner is a life insurance company organized under the laws of the State of Tennessee with its principal office and place of business in Chattanooga, Tennessee, and has for many years maintained sales offices in the City of Memphis and does business, among other states, in the states of Tennessee, Arkansas and Mississippi.

The repondent is a subsidiary of General Tire and Rubber Company and owns and operates a chain of radio and television stations in various parts of the United States, including Television Station WHBQ in Memphis, Tennessee.

For a number of years prior to the year 1953, Harding College of Searcy, Arkansas, owned and operated a radio station located in the Chisca Hotel, Memphis, Tennessee, and in the year 1953, it obtained from the Federal Communications Commission a license or permit to operate a television station, WHBQ T. V. upon Channel 13, in Memphis, Tennessee (282a., 283a).*

* This reference and all other references containing "a" are references to pages in respondent's appendix filed in the Court of Appeal.

Harding College, desiring to obtain suitable broadcasting facilities for the operation of its said proposed television station, approached petitioner for the purpose of interesting petitioner in acquiring a certain tract of land in Memphis, Tennessee and building thereon broadcasting facilities suitable for use and occupancy by said proposed television station for ten years, in exchange for advertising time to be delivered over said television station in petitioner's behalf (35a.) during said period.

As a result petitioner and Harding College entered into such a contract in August, 1953, whereby petitioner agreed to acquire the specified tract of land and construct thereon specified broadcasting facilities and whereby the television station was to occupy this land and building when completed for ten years in exchange for certain television advertising to be delivered over said television station on petitioner's behalf. This contract appears as Exhibit 1 (428a.), and was executed prior to any actual operation of the station (282a., 283a.).

Petitioner had never before built a building for occupancy by others (4b., 5b.)* and its only purpose in doing so on this occasion was its desire to receive television advertising in the rapidly growing and expanding Memphis trade area (35a., 36a.). In fact, petitioner would not have acquired this land and built the building except for this reason (36a.).

In late June, 1954, construction of the building in question was completed and the premises were turned over to Harding College in July, 1954 for occupancy by the television station for a period of ten years (284a.).

Respondent, some months prior to completion of the building itself and, of course, before occupancy, had pur-

* This reference and all other references containing "b" are references to pages in petitioner's appendix filed in the Court of Appeals.

chased the television station from Harding College contingent only upon obtaining approval of the sale by the Federal Communications Commission. Such approval was obtained in early July, 1954 and respondent assumed all the obligations of Harding College under the contract, a few days after the initial occupancy of the building by Harding College (38a.).

It is admitted by respondent that there was nothing in the obligation to deliver on petitioner's behalf the called for television advertising time which was objectionable to respondent and it is likewise admitted that respondent could have, in fact, delivered same fully, had it seen fit to do so (68b.).

Paragraphs 7 and 8 of the contract (430a., 431a., 432a.) are the pertinent provisions of the contract. Inasmuch as these provisions are set forth verbatim on footnote 1 to both the reported and the appended opinion of the United States Court of Appeals for the Sixth Circuit filed June 11, 1963, same are not set forth verbatim herein.

However, paragraph 7 in effect requires respondent to deliver in petitioner's behalf a minimum of twenty advertising spot announcements over its television station daily during the term of the contract.

Paragraph 8 provides in essence that if petitioner ever desired to discontinue its television advertising program, then, in such event, petitioner, and at respondent's election, could either (a) sell its allotted advertising time for cash to others, or (b) receive a cash rental from respondent in accordance with the formula therein set forth, which would amount to a cash rental of $9,600.00 annually. Petitioner, however, never elected to discontinue its television advertising program and, consequently, these alternative provisions never became effective.

The record discloses that in May of 1959 it was brought to petitioner's attention that it was not receiving all of

the announcements to which it was entitled under its contract, and as a result of an inquiry made at that time, petitioner discovered that it had received only two-thirds of the minimum number of television announcements called for by the contract (9b.).

Upon discovery that petitioner had in fact received only two-thirds of the required number of announcements during the period from July, 1954, to May, 1959, petitioner thereupon filed the instant suit against respondent seeking damages for breach of the contract.

The breach of the contract was admitted, and there was no real dispute as to the number of announcements not given in breach thereof. Further, it is undisputed that the time owed petitioner and not given, was used by respondent. Consequently, the only real issue presented in the trial was that of damages for breach, together with attorneys' fees and expenses incurred by petitioner in connection with the suit.

It was and is petitioner's theory that in assessing damages for breach of contract to deliver a valuable commodity, to-wit, television advertising time, the jury could consider, among other factors, the market value of the commodity not delivered.

The following proof on the issue of damages is in this record:

(1) That petitioner's sole purpose in acquiring the land and erecting the special-purpose building thereon, to respondent's specifications, was to obtain television advertising time in its behalf (35a., 36a.). Otherwise, it would not have been interested in acquiring the land and building the special-purpose facilities in question (36a.).

(2) That during the period in controversy respondent at all times published rate cards showing the prices at

which it was willing to sell such advertising time to advertisers at large (30b., 31b.).

(3) That the number of omitted announcements as shown by respondent's own records amounted to 12,208 announcements (84b.).

(4) That the price petitioner would have to pay to purchase said omitted announcements for cash from respondent was established by respondent's published rate cards and conversely the value which the respondent itself placed upon these omitted announcements was shown by its published rate cards (63b., 64b., 65b.).

(5) That respondent offered such announcements for sale to the public, on its published rate cards (Ex. 22, 449a.) and, in fact, sold identical announcements to others during the period in question (69b., 70b.) (Ex. 48, 459a).

(6) That in the last ten to twelve years television advertising has become the most powerful, effective and important type of advertising media (21b.) and that petitioner's contract for twenty advertising announcements daily for ten years was a tremendously valuable advertising contract (51b.).

(7) That the published rate cards of a television station are the best yardstick for valuing television time (55b.), that as a matter of practice in the industry discounts were not given for frequency in excess of those shown on the rate cards (31b., 32b., 33b.) and that petitioner's contract would not be discounted beyond discounts shown on the rate cards (65a., 66a.).

(8) That Harding College owned and operated a radio station prior to obtaining a license or permit to operate the television station WHBQ T.V. (282a., 283a.), and that respondent owns and operates a chain of radio and television stations, establishing experience on the part of both in the advertising world.

(9) That respondent wrote petitioner a letter in December of 1959 (Ex. 2, 309a., 310a.), in which respondent itself measured the value of plaintiff's television spot announcements in terms of cash in accordance with its published rate cards.

(10) That the value of the omitted announcements, computed in accordance with respondent's own published rate cards, and after giving effect to all applicable frequency discounts as shown thereon (ranging from not less than 25% to as much as 60%) amounted to $323,243.07 (85b.); or an average value per announcement of $26.48 (87b.).

The foregoing proof clearly established a fact issue as to what damages may reasonably be said to have been within the contemplation of the parties as a probable result of the breach of the contract.

In submitting the case to the jury the trial court properly charged the jury (the entire charge appears at pages 405a.-415a. and the pertinent portion thereof appears as footnote 2 to both the reported and the appended opinion of the Court of Appeals, filed June 11, 1963) in part as follows:

> "'Now, members of the jury, in arriving at the amount of damages, if any, plaintiff is entitled to recover, there is another principle of law of damages as to which the Court will charge you. This principle is that a party which has suffered a breach of contract may recover, for such breach, damages and only such damages as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of a breach of it. In determining what damages can reasonably be said to have been in the contemplation of both parties, at the time they made the contract, as a

probable result of the breach of it, you may consider all the facts and circumstances which have been admitted in evidence in this case, including all of the terms of the contract itself.' "

The jury, plainly directed by the charge to determine the fact issue of whether or not the market value of the television advertising time was within the contemplation of the parties as the probable result of a breach of the contract, resolved the issue in favor of petitioner by returning a verdict for petitioner in the total amount of $165,900.00, of which $150,000.00 was assessed as damages for breach of the contract and $15,900.00 was awarded as attorneys' fees and expenses (15a.) and judgment thereon was entered (16a.).

The award of compensatory damages in the amount of $150,000.00 was less than half the value of the omitted announcements computed in accordance with respondent's own published rate cards, to-wit $323,243.67.

Respondent moved for judgment notwithstanding a verdict or for order granting new trial (17a; 24a.).

The trial court approved the jury verdict and overruled respondent's said motion (31a., 32a.).

Respondent appealed.

OPINION OF THE COURT OF APPEALS

In the face of this proof the Court of Appeals has held that there is no proof in the record warranting the submission to the jury of the issue as to whether or not the market value of television advertising time could be said to have been within the contemplation of the parties as a probable result of breach of the contract. It necessarily follows that in arriving at this result the Court of Appeals has retried this issue, one plainly for the jury in the light

of the foregoing proof and has substituted its finding of fact for that of the jury.

The Court of Appeals further found in reviewing the proof that in its opinion the sole and only measure of damages to be applied in this case is the alternative cash formula appearing in paragraph 7 of the contract, which the Court said would amount to an annual figure of $9,600.00, completely ignoring the immediately preceding clause of the contract which contemplated that petitioner be entitled to sell its allotted television time for cash for its own account if it ever elected to discontinue its advertising program.

The Court of Appeals then concluded that since petitioner, over a period of five years, had not received one-third of the announcements to which it was entitled, it could, therefore, recover only one-third of the $9,600.00 figure annually over the five year period, or $16,000.00.

The Court of Appeals then held that the $150,000.00 jury award for compensatory damages was excessive to the extent that it exceeded $16,000.00 and ordered that the jury verdict in favor of the petitioner herein would be reversed and the case remanded for a new trial unless petitioner files herein a remittitur of $134,000.00, approximately 90% of the jury award of $150,000.00.

A petition to rehear was filed and denied.

ARGUMENT.

I.

The Court of Appeals, in Reviewing a Jury Verdict for Breach of Contract for Failure to Deliver a Commodity, Has Reduced the Jury Verdict and Judgment in Violation of the Seventh Amendment and Applicable Decisions of This Court by Substituting Its Findings of Fact for That of the Jury Under Conflicting Proof as to What Damages May Be Said to Have Been Within the Contemplation of the Parties.

This was a common law action for breach of contract. And the recognized conflicts in the evidence gave the jury the right to determine from the facts presented the question as to what damages may reasonably be supposed to have been within the contemplation of the parties, when the contract was made, as a probable result of the breach of it.

The jury, under a proper charge, found that the value of the television time was within the contemplation of the parties. However, the Court of Appeals has re-examined the verdict of the jury and the approval of same by the trial Judge and has concluded otherwise, with the result that the jury verdict has been reduced by almost 90%.

In doing so, the Court of Appeals has held as a matter of fact that the market value of this television advertising time could not be said to have been within the contemplation of the parties when the contract was made. The Court of Appeals then found as a matter of fact that one of the two alternative methods of paying rent set forth in Paragraph 8 of the contract, these alternatives never having become effective, established the only and sole measure of damages applicable to the facts of this

case, completely ignoring the other of said two alternative methods, which shows on its face that the market value of this television time was equally within the contemplation of the parties.

Therefore, having retried this fact issue and having arbitrarily selected one of these two alternative methods of paying rent as the sole and exclusive measure of damages the Court of Appeals then held that this verdict was excessive by the amount that it exceeded the measure of damages established by the Court of Appeals. If the Court of Appeals is correct, then the following proof in this record must be completely expunged because it conclusively demonstrates that the issue of whether or not the market value of this television advertising time could be said to have been within the contemplation of the parties as a possible result of breach of the contract, was a proper issue for the jury to decide and not one for review by an Appellate Court on appeal:

(1) Respondent and its predecessor were both engaged in the advertising business via the operation of radio and television stations.

(2) The value of the television time was the sole inducement for petitioner to enter into this contract.

(3) Respondent at all times established a valuation of this television time by its own published rate cards which are the best yardstick for valuing television time, the same showing the going rates therefor in the market place, and what businessmen are willing to pay for it.

(4) Respondent's own letter to petitioner placing a monetary value on petitioner's advertising spots in accordance with respondent's published rate cards.

(5) Respondent's own rate cards establishing the market value of identical television advertising spots and offering same for sale.

(6) The first of the two alternative methods of paying rent in paragraph 8 of this contract appearing immediately before the alternative method adopted by the Court of Appeals as the sole measure of damages in this case which expressly provides:

> "The time allotted to the Lessor may be sold by the Lessor to another advertiser or advertisers and the proceeds therefrom be retained by the Lessor."

(7) And, while perhaps not proof as such, the very practical and inescapable conclusion that when two parties contract for delivery of a commodity there is no way in the world for the value of that commodity not to be a matter of consideration and importance to one or both, and within their contemplation.

This action by the Court of Appeals is a plain, clear and obvious violation of the express language of the Seventh Amendment, as it constitutes the re-examination of a question of fact tried before a jury whose verdict thereon has been approved by the trial court.

This Court has repeatedly held that the Courts of Appeal have no right or authority to substitute their facts findings for that of the jury where there is evidence in the record to support the jury verdict and the trial court has approved the verdict.

In **Parsons v. Bedford, Breedlove & Robeson**, 28 U. S. 433, 7 L. Ed. 732, 737, this Court, after quoting the Seventh Amendment, said:

> "This is a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable; or

the award of a venire facias de novo by an appellate court for some error of law which intervened in the proceedings. The Judiciary Act of 1789, ch. 20, sec. 17, has given to all the courts of the United States 'power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law.' And the appellate jurisdiction has also been amply given by the same act (secs. 22, 24) to this court to redress errors of law; and, for such errors to award a new trial, in suits at law which have been tried by a jury."

In **Fairmount Glass Works v. Cub Fork Coal Co.**, 287 U. S. 474, 77 L. Ed. 439, 443-444, 53 S. Ct. 252, this Court refused to set aside a judgment based upon a jury verdict for $1.00 which was admittedly less than the actual damages of the party. The Court said:

"First. The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. The rule precludes likewise a review of such action by a circuit court of appeals. Its early formulation by this Court was influenced by the mandate of the Judiciary Act of 1789, which provided in Sec. 22 that there should be 'no reversal in either (circuit or Supreme) court on such writ of error . . . for any error in fact.' Sometimes the rule has been rested on that part of the Seventh Amendment which provides that 'no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.' More frequently the reason given for the denial of review is that the granting or refus-

ing of a motion for a new trial is a matter within the discretion of the trial court."

In **United States v. Socony-Vacuum Oil Co.**, 310 U. S. 150, 247, 60 S. Ct. 811, 84 L. Ed. 1129, this Court said:

> "Hence this case falls within the well established rule that neither this Court nor the Circuit Court of Appeals will review the action of a federal trial court in granting or denying a motion for a new trial for error of fact, since such action is a matter within the discretion of the trial court. Fairmount Glass Works v. Cub Fork Coal Co., 287 U. S. 474, 53 S. Ct. 252, 77 L. Ed. 439. Certain exceptions have been noted, such as instances where the trial court has 'erroneously excluded from consideration matters which were appropriate to a decision on the motion.' Fairmount Glass Works v. Cub Fork Coal Co., supra, 287 U. S., page 483, 53 S. Ct., page 255, 77 L. Ed. 439. . . ."

In **United States v. Johnson**, 327 U. S. 106, 112, 90 L. Ed. 562, 66 S. Ct. 464, this Court said with respect to a similar situation:

> "The trial judge's findings were supported by evidence. He had conducted the original trial and had watched the case against Johnson and the other respondents unfold from day to day. Consequently the trial judge was exceptionally qualified to pass on the affidavits. The record of both the original trial and the proceedings on the motions for a new trial shows clearly that the trial judge gave the numerous elements of the controversy careful and honest consideration. We think that even a casual perusal of this record should have revealed to the Circuit Court of Appeals that here nothing more was involved than an effort to upset a trial court's findings of fact."

In **Neese v. Southern Railway Company**, 350 U. S. 77, 100 L. Ed. 60, 76 S. Ct. 131, this Court in a per curiam decision likewise held in a similar situation:

> "We reverse the judgment of the Court of Appeals, 216 F. 2d 772, without reaching the constitutional challenge to that court's jurisdiction to review the denial by the trial court of a motion for a new trial on the ground that the verdict was excessive. Even assuming such appellate power to exist under the Seventh Amendment, we find that the Court of Appeals was not justified, on this record, in regarding the denial of a new trial, upon a remittitur of part of the verdict, as an abuse of discretion. For apart from that question, as we view the evidence we think that the action of the trial court was not without support in the record, and accordingly that its action should not have been disturbed by the Court of Appeals."

The astounding result reached by the Court of Appeals in this case likewise is contrary to its own stated position on review of a jury verdict.

In **Still v. Townsend**, 311 F. 2d 23, 25 (6th Cir.), this very Court of Appeals after stating the holding by this Court in **Fairmount Glass Works v. Cub Fork Coal Co.**, supra, stated that it recognized only one exception to the rule of non-reviewability on appeal:

> "But the exception is limited to a situation where the uncontradicted and undisputed facts leave no factual issue for the consideration of the jury and it is clearly shown that the verdict is an abuse of power on the part of the jury."

In the light of the proof in this record by no stretch of the imagination can it be said that "the uncontradicted

and undisputed facts leave no factual issue for the consideration of the jury" with respect to whether or not the value of this television advertising time was within the contemplation of the parties at the time the contract was made, as a probable result of a breach thereof.

If the Courts of Appeal are permitted to reduce jury verdicts, as here, by saying that there is no proof in the record on a fact issue when the record conclusively demonstrates otherwise, then the Seventh Amendment to the United States Constitution and the decisions of this Court are thereby circumvented and the Courts of Appeal are constituted as the "triers of fact" and not the jury.

II.

The Court of Appeals Has Held, Contrary to All Applicable Authority, That the Value of the Advertising Time Involved Herein Cannot Be Considered in Arriving at the Measure of Damage for Breach of This Contract.

It is basic that in a breach of contract action for damages for failure to deliver any particular commodity which is bought and sold in the market place, the market value of such commodity can be considered as a proper measure of damages.

The case of **Gardner v. The Roycrofters**, 134 App. Div. 45, 118 N. Y. S. 703, aff'd 197 N. Y. 511, 90 N. E. 1158 (1909), is direct authority for the proposition that in a case of this nature the market value of the omitted advertising matter is a proper measure of damages.

In this case plaintiff had purchased from the defendant publishing company all of the advertising space in two periodicals published by the defendant, less certain expressly designated space which the defendant was permitted to use for its own advertising purposes. The de-

fendant breached this agreement by using more than the amount of space which had been allocated to it under the contract, and the plaintiff brought suit. Upon trial, the plaintiff was awarded damages in an amount equal to the market value of the appropriated space at the time of the breach. This was affirmed upon appeal, the Court holding specifically:

> "They (the defendants) knew the only price at which space in the magazine was sold, and the stipulated price for exchange of merchandise advertisements, and, with such knowledge elected to use such space and, when plaintiff asked them to pay for the same, they are not in a position to deny that they occupied this space upon the usual terms. They can not rely upon their own wrong to deprive the plaintiff of the price which similar advertisements paid" (118 N. Y. S. at 705-706).

Another case in point is that of **Tribune Co. v. Bradshaw**, 20 Ill. App. 17 (1886). This likewise was a suit for damages for failure to deliver newspaper advertisements. In discussing the proper measure of damages the Court of Appeals of Illinois at page 23 stated:

> "The applicable rule to the sales of personal property is, that where the article is one that can be bought in the market, the proper measure of damages for the breach of the contract to deliver is the difference between the contract price and the market price at the time of the breach. . . . We think that a rule entirely analogous to the foregoing should apply in determining the measure of damages for the breach of a contract like the one in suit, if it be true that an advertisement of like character was readily obtainable in the market. If no such advertisement could be obtained, so as to invoke the application of a different rule in the admeasurement of damages, it was for the

plaintiff to show that fact. As he has made no such proof, it will be presumed that a similar advertisement could have been readily obtained at the same price, and such price must be held to constitute the measure of damages . . . ." (20 Ill. App. at 23).

The following cases likewise are authority for the proposition that in a suit for breach of an advertising contract, the value of advertising space is a proper measure of damages.

World's Columbian Exposition v. Fasteur-Chamberlain Filter Co., 82 Ill. App. 94 (1898);

Mudge & McLean v. Adams, 37 Tex. Civ. App. 186, 83 S. W. 722, 22 L. R. A. (N. S.) (1904).

Tennessee decisions are not in conflict with, but are in accord with, the foregoing cases. In Tennessee the usual measure of recovery for breach of contract is the value of the promised performance.

In **Allen v. Elliott Reynolds Motor Co.**, 33 Tenn. App. 179, 230 S. W. 2d 418 (Cert. denied), wherein the Court, speaking through Judge Felts, now a Justice of the Supreme Court of Tennessee, said at page 192:

> "The usual measure of recovery for breach of contract is the value of the promised performance.

Likewise, in the case of **Black v. Love & Amos Coal Co.**, 30 Tenn. App. 377, 206 S. W. 2d 432 (Cert. denied), the Court of Appeals again speaking through Judge Felts, said at pages 383-384:

> "Ordinarily, the only loss the buyer sustains from the seller's non-delivery of the goods is the difference between the contract price and the market price of the goods, because he can replace them by buying in the market. "The proper measure of damages in general is the difference between the contract price

and the market price of such goods at the time when, and place where, the contract is broken, because the purchaser having the money in his hands may go into the market and buy." 5 Williston on Contracts, Rev. Ed., sec. 1383; Tennessee Fertilizer Co. v. International Agricultural Corporation, 146 Tenn. 451; 463-464, 243 S. W. 81.

"In cases, however, where there is no available market or where there are other special circumstances enhancing his loss, the buyer may recover such damages as naturally arise, according to the usual course of things, from the seller's breach, or such as may reasonably be supposed to have been contemplated by the parties, at the time of making the contract, as the probable result of its breach. Code Section 7260; Chisholm & Moore Mfg. Co. v. United States Canopy Co., 111 Tenn. 202, 77 S. W. 1062; Hagan v. Nashville Trust Co., 124 Tenn. 93, 136 S. W. 993."

The Court of Appeals has ignored the foregoing authorities and attempts to justify its holding on the basis of the decisions involving suits against Western Union and other common carriers for failure to deliver. The rationale of these cases is that the defendants therein should not be charged with liability for unforeseeable damages arising independent of the contract itself, without some notice to them of special circumstances which, if disclosed, would render them liable for special damages.

This is, of course, an extremely different situation from that involving the failure of a party to deliver a commodity when he well knows its value, deals with it daily in the market place and establishes and publishes its value. There is no hidden or concealed pitfall for him. He well knows his liability if he chooses not to deliver.

In **Provident Life & Accident Insurance Co. v. Globe Indemnity Co.**, 156 Tenn. 571, 576, 3 S. W. 2d 1057, the

Supreme Court of Tennessee said, in a breach of contract suit:

> "... In the consideration of this case, and cases of like character, a condition of proof is met which makes it impossible to arrive at a conclusion which we would say gave to complainant an amount which would exactly, and to the dollar, or the cent, represent the damages the complainant has sustained by reason of the breach of the contract by the contractor, but we cannot be satisfied, for this reason, to repel the complainant and allow no recovery. If this standard were applied to building and construction contracts generally, the courts would be powerless, and the parties helpless, in the matter of relief from the courts. Exact justice is not always attained, and the law does not require exactness of computation in suits that involve questions of damages growing out of contract or tort. These cases most often involve in one way or another the acceptance of evidence which is not proof against possible error or mistake."

In **Buice v. Scruggs Equipment Co.** (1953), 37 Tenn. App. 556, 267 S. W. 2d 119, the Court said:

> "The amount of damages is primarily a jury question and the law does not require exactness of computation in suits involving questions of damages growing out of contracts."

In **Calkins v. F. W. Woolworth Co.**, 27 F. 2d 314 (8th Cir.), cert. denied 278 U. S. 645, the Court of Appeals said, in a breach of contract suit:

> "The general rule is that, where the cause and existence of damages have been established with sufficient certainty, recovery will not be denied because they are difficult of ascertainment. In such cases the amount may be fixed by the jury in the exercise

of a sound discretion under proper instructions from the court. . . . While those rules have been more generally applied to torts, they also apply to actions for breach of contract, and a party who has broken his contract ordinarily will not be permitted to escape liability because of uncertainty as to the amount of damages resulting therefrom. . . .

Under the foregoing authorities the Court of Appeals is clearly in error in holding that the jury in the case at bar cannot consider the value of the advertising time in arriving at the measure of damages.

III.

The Court of Appeals Has Rewritten the Instant Contract So as to Give an Option to the Party in Breach Whereby It May Profit From Its Own Breach.

Petitioner respectfully submits that the effect of the Court of Appeal's opinion is to rewrite the contract between it and respondent at the expense of the innocent party and to the benefit of the wrongdoer, so that now respondent, the party in breach of the contract, has an election to either give petitioner its television time or to pay $9,600.00 per year rent.

If what the parties had in mind was that the respondent would have an option whereby it could elect to deliver the television time, or in lieu thereof, pay $9,600.00 per year rent, it would certainly appear in this contract.

The proof in this record is clear and uncontroverted that television time has been an increasingly valuable and expensive commodity over the past ten years.

Petitioner asks the question: If respondent now chooses not to give petitioner the remainder of the television time

due it under its contract, which respondent could do with impunity pursuant to the Court of Appeal's opinion, and simply tenders petitioner a check based on a rental of $9,600.00 per year, what remedy would petitioner have? The answer is none.

The respondent would then be free to sell this valuable time at the price at which these rate cards show that such time can be sold, and petitioner can sit with a useless piece of paper in its hand and look in vain for any language which says the respondent has the election of either scheduling petitioner's announcements or paying petitioner a cash rent of $9,600.00 per year.

In such circumstances petitioner could well meditate about its sole and only purpose for entering into the contract, to wit, to obtain television advertising time. It could not possibly take its rental check and go out on the open market and buy the equivalent space called for by its contract. The rate cards and the testimony in this case clearly show that petitioner could not even begin to replace this advertising with its rent check.

Petitioner submits that if the Court of Appeals is correct, then paragraph 8 of this contract as written must, of necessity, be absolutely deleted in its entirety, and in lieu thereof there must be substituted a provision that respondent has at all times an option to discontinue scheduling petitioner's called-for television advertising time upon payment to petitioner of the sum of $9,600.00 per year.

The proposition that courts are not empowered to vary or rewrite contracts in this fashion is such a fundamental one that it is not deemed necessary to cite to this Court any legal precedent in support thereof.

CONCLUSION.

Petitioner respectfully submits that this petition should be granted so that the right of trial by jury as guaranteed by the Seventh Amendment and the applicable decisions of this Court with respect thereto may be available to not only this, but all litigants, in the Federal Courts of the United States.

Petitioner further respectfully submits that this petition should be granted for the reason that the Court of Appeals has so far departed from the accepted and normal course of appellate review as to call for an exercise of this Court's power of supervision.

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No. 15,004.

United States Court of Appeals
For the Sixth Circuit

Interstate Life & Accident Insurance Company, Plaintiff-Appellee, v. RKO Teleradio Pictures, Inc., Defendant-Appellant.	Appeal from the United States District Court for the Western District of Tennessee, Western Division.

OPINION OF THE COURT OF APPEALS

Decided June 11, 1963

Before: Weick and O'Sullivan, Circuit Judges, and Darr, Senior District Judge.

Weick, Circuit Judge. The pivotal question in this appeal is the amount of damages to be awarded for partial breach of a lease of real property to a television station which lease contained a provision for the payment of rent in station identification announcements.

Interstate entered into a lease agreement with Harding College whereby it agreed to acquire land and construct a new building thereon in Memphis, Tennessee to house Harding's television station. The lease was to commence upon the completion of the building and continue for ten years.

The lessee agreed to pay as rental a minimum of twenty station identification announcements each day with an

advertising display which was to include the call letters "WHBQ-TV." The announcements were thus shared by each of the parties taking a portion thereof. They were known as "shared I. D." The pertinent provisions of the lease are set forth in the footnote.[1]

[1] "7. Yielding and paying as rent therefor the rent and sums and services due as herein stipulated: as rent for the leased premises the Lessee shall grant the Lessor the right to all station identification announcements except as hereinafter provided, but in no event less than a minimum of twenty (20) station identification announcements each day; each station identification announcement to be a minimum of eight (8) seconds in duration. Said station identification announcements shall be divided throughout each day in such a manner that at least five (5) station identification announcements are scheduled between the hours of 9:00 A. M. and 12:00 Noon, at least five (5) between 12:00 Noon and 3:00 P. M., at least five (5) between 3:00 P. M. and 6:00 P. M., and at least five (5) between 6:00 P. M. and 10:00 P. M. Said station identification announcements shall include an advertising display as requested by the Lessor and approved by the Lessee, said display to include the "call letters" WHBQ-TV in a legible manner. Verbal identification of Lessor acceptable to and approved by Lessor shall be included on each said station identification announcement. Only the expense of any slides or other advertising material shall be borne by the Lessor. In addition, the Lessor shall have the right to use one ten (10) minute period each week at times to be agreed upon by the Lessor and the Lessee between the hours of 3:00 P. M. and 10:00 P. M.; said agreed upon times subject to change to a time within the hours stated of equal value within a seven (7) day period without notice. All material, artists and contents of said 10 minute programs shall be subject to the approval of the Lessee, and shall not be used for any commercial purpose other than advertising the Lessor or its products. The Lessee has the right to use for its own purposes, commercial or otherwise, a maximum of twenty (20) station identification announcements per week provided no more than four (4) of these station identification announcements are used in any one given day; and provided further, that no station identification announcement may be used for or sold to any other insurance company whatsoever;

"8. Anything herein to the contrary notwithstanding, the Lessor shall have the right thirty (30) days prior to the beginning of any calendar year to discontinue the method of rent described herein, and to receive as rent in lieu thereof the rent, sums or services derived from whichever of the following two (2) methods is elected by Lessee: (1) The time allotted to the Lessor may be sold by the Lessor to another advertiser or advertisers and the proceeds therefrom be retained by the Lessor, or (2) the said time allotted to

The land was acquired at a cost of $30,000 and the building at $112,000. Interstate incurred additional expenses of $9,000. The total cost was $151,000. Shortly after the building was completed, Harding College sold its television station to appellant RKO Teleradio Pictures, Inc. and assigned the lease to this company which assumed all the obligations of the lessee.

RKO commenced to operate the television station and furnish the I. D. announcements to Interstate. Under date of December 28, 1956 the manager of RKO wrote Interstate advising that the station had missed certain announcements and offering to supply them. Interstate replied that it was considering the matter and would write further, but failed to do so. It made no complaint until May 1959. It

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the Lessor may be relinquished to the Lessee, in which event the Lessee shall pay an amount equal to the total of the following amounts: (a) estimated annual cost of all real estate taxes and assessments, (b) annual cost of fire and extended coverage insurance in an amount equal to the replacement cost of the building, such insurance to be underwritten by companies approved by the Lessor, (c) an amount equal to the annual depreciation on the total cost of the building less the portion of the cost of the building which shall be borne by the Lessee as provided in paragraph No. 4, depreciation to be computed at the rate of two (2%) per cent per annum, (d) an amount equal to three (3%) per cent of the Lessor's net investment which net investment is defined as the total cost of the leased premises including the land, buildings and improvements less that portion of the cost borne by the Lessee (as provided in paragraph No. 4) and less the accumulated annual charges for depreciation.

"9. The Lessee shall have an option for a renewal of this lease for a further term of five (5) years or such other term of years as may then be agreed upon by the parties hereto, such option to be exercised at least three months before the termination of this lease, by mailing postpaid, or delivering to the Lessor, a written notice of the desire of the Lessee to renew said lease. If not so exercised, it shall be forfeited. Said renewal shall be on terms and conditions to be agreed upon at the time the option is exercised, said terms and conditions to be in conformity with the square footage rental charges applicable at that time to buildings of like kind, condition and age in the City of Memphis, Tennessee, similarly located in the Cleveland Street area between Peabody Avenue and North Parkway Boulevard."

filed suit in the District Court to recover damages in the amount of $700,000 of which $400,000 was for the reasonable value of the omitted announcements and $300,000 for loss of profits. Under date of December 4, 1961, with leave of court, it waived and withdrew its claim for loss of profits.

The case was submitted to a jury which returned a verdict in favor of Interstate and assessed its damages for breach of contract in the amount of $150,000 and awarded it $15,900 for attorney's fees and expenses or a total of $165,900.

In this Court, the principal claim of RKO was that the verdict was grossly excessive. In an eighty page brief, RKO raised twenty points which it claimed required reversal of the District Court's judgment.

The period of time involved in the damage claim was about five years or 1,793 days. RKO admitted that it was required to give a minimum of 34,810 announcements during this period; that it actually delivered 27,496 announcements and was short 7,314. It delivered approximately 15 announcements per day.

Interstate claimed that the shortage amounted to 12,208 or approximately one-third of the station identification announcements called for under the lease.

RKO offered proof in the District Court tending to show that the shortage was inadvertent and unintentional; that it did not have an accounting system at the time for the shared station identification announcements like it had for other advertisers and no checkoff system against laxity of the traffic clerk who scheduled the announcements. It further claimed that the lease called for so many daily announcements that a point of saturation had been reached whereby any announcements in addition to those actually

furnished had no value as advertisements, but would serve merely to annoy or irritate listeners.

On some days the station did not broadcast until noon and hence could not schedule any announcements in the morning. Interstate asserts that it makes no claim with respect to announcements not scheduled when the station was not on the air.

There was no evidence that RKO during the time in question sold to others any of the contracted for station identification announcements. During this period Interstate made reports to the Department of Insurance and Banking of the State of Tennessee and filed federal income tax returns which showed rental income received by it from the leased property in the annual amount of $9,600. This identical figure can be obtained by computing the cash rent in accordance with the formula provided in the second alternative in Paragraph 8 of the lease.

It was Interstate's contention that it was entitled to recover as damages the amount charged other advertisers by RKO for spot announcements. Interstate used the highest discount rate shown on RKO's rate cards which ranged from 25% to 60% and arrived at a value of $323,243.07 for the announcements not delivered or an average of $26.48 per announcement.

If the value of $26.48 placed by Interstate on each announcement is correct, then Interstate actually received rent for the five-year period of $598,500.96 ($26.48 × 22,602). To this should be added the amount of the verdict of $150,000 making the total rent for the five-year period of $748,500.96. The rental for the 10-year period would be twice this amount or $1,497,001.92.

This would be a fairly good return on an investment of only $151,000, particularly since Interstate still owns its land and the building which has depreciated at the agreed

rate of 2% annually or $12,000 over the five-year period or $24,000 in 10 years.

To say that this was within the contemplation of Interstate and Harding College at the time they entered into the lease requires a wild stretch of the imagination. The alternative annual cash rent of $9,600, computed under the provisions of Paragraph 8 of the lease, certain does not support this contention. Nor does Paragraph 9 which provided an option for renewal of the lease at a rental to be determined "in conformity with the square footage rental charges applicable at that time to buildings of like kind, condition and age in the City of Memphis. . . ."

Under Tennessee law, the damages recoverable for breach of contract are "such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is such as might naturally be expected to follow its violation." **Western Union Telegraph Co. v. Green**, 153 Tenn. 59, 64; **Illinois Central R. R. Co. v. Johnson & Fleming**, 116 Tenn. 624; **Morristown Lincoln Mercury v. Lotspeich Pub. Co.**, 42 Tenn. App. 92; 15 Am. Jur. Damages, § 52, p. 451.

Morristown Lincoln Mercury, supra, was an action by a dealer against a newspaper for breach of contract to publish an advertisement for the sale of automobiles. The dealer claimed that he had contracted to purchase the automobiles but was unable to sell them at a profit because of the refusal of the newspaper to publish the advertisement. The appellate court held that the claim for loss of profits in the sale of the automobiles was too conjectural to allow recovery therefor and awarded nominal damages only. The court said: "Therefore, no actual damages having been proved, none can be recovered under the authorities cited."

Undoubtedly the reason Interstate accepted the television announcements in lieu of cash rent was to secure new

business through advertising thereby increasing its profits, but we cannot consider loss of profits because Interstate has waived that claim. Its waiver was probably influenced by Tennessee law which required more proof of loss of profits than mere conjecture or guesswork.

To prove its damages, Interstate offered in evidence, over the objection of RKO, rate cards which indicated the prices at which advertising was sold by RKO to others in the quantities stated thereon. None of the cards dealt with shared station identification announcements or quantities as large as involved in the case at bar.

We think this evidence was inadmissible. Interstate's measure of damages was not the price for which RKO could sell advertising to others because, under the terms of the lease, Interstate had no right to sell the announcements to which it was entitled. If RKO were suing an advertiser for damages for failure to take advertising under a contract, it could not have recovered the full contract price when it had not furnished the advertising. This is so because the cost of furnishing the advertisement would have to be taken into account. Not all of the contract price represented profit. On the other hand, an advertiser who had not received all of the agreed announcements for which he had paid in cash could certainly recover back the proportion of his payment applicable to the omitted announcements even though he could prove no other damage.

As we view the provisions of Paragraph 8 of the lease, Interstate could discontinue taking the announcements and accept in lieu thereof either of the following two methods elected by RKO:

1. Sell its allotted time to other advertisers, or

2. receive rent in cash computed as provided for therein

Interstate did not discontinue taking the announcements, but on the contrary continued to receive them. It did not want RKO to supply the omitted announcements. It wanted cash instead.

The trouble here is that Interstate does not want the cash rent to be computed as stipulated in the lease, but insists on obtaining in cash the fair and reasonable value of the announcements. This it cannot have because RKO did not object to permit Interstate to sell the announcements.

The Trial Judge instructed the jury in part as set forth in the footnote.[2] We think it was error for the court to

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[2] "In awarding compensatory damages, the object is to place the plaintiff in the same position, in terms of money, as it would have been in had the contract not been breached. Plaintiff here is not suing for restitution or to have returned what it paid out under the contract, but rather is suing for and is entitled to have the benefit of its bargain—its expectancy, so to speak. Therefore, in arriving at just compensation for the plaintiff for the breach of contract involved here, it is necessary for you to place a reasonable and fair value on the shared station identification announcements which you find were not delivered in breach of the contract. At the same time, members of the jury, since plaintiff is not entitled to be placed in a better position in terms of money than it would have been in had the contract not been breached, plaintiff in no event is entitled to recover a sum greater than the amount that you find it has actually been financially harmed by such breach of contract. In other words, plaintiff should not be allowed to profit from any such breach of contract; the object is, as I say, in awarding any damages, to make the plaintiff as well off but no better off than it would have been had the contract not been breached.

"Now the plaintiff has offered in evidence, in support of its theory of the value of the announcements involved and in support of its theory of the amount of damage incurred, the rate cards issued by the defendant television station as well as expert testimony and other evidence, and the Court charges you that you may consider that evidence in arriving at the reasonable and fair value of the television time involved and in arriving at the financial harm the plaintiff suffered, if any, as a result of the breach of contract involved.

"On the other hand, defendant has offered evidence as to discounts allowable for large amounts of television time, evidence as to another actual sale of television time, evidence of what plaintiff paid for this television time, and other evidence in support of

instruct the jury that the plaintiff was entitled to the benefit of its bargain and could consider the rate cards in arriving at the fair and reasonable value of the television

its theory of the value of the announcements involved, and the Court charges you that you may consider that evidence in arriving at the reasonable and fair value of the announcements involved.

"The Court has heretofore charged you that plaintiff is entitled to be made monetarily as well off but no better off than it would have been had the contract been carried out. This is a general principle of the law of damages which is applicable here. This being the law, and since under the lease contract plaintiff was entitled to receive announcements and since the right to receive announcements could not be sold or otherwise transferred by plaintiff, it follows that, in determining the amount of any damages to which plaintiff is entitled, you must consider the actual damaging effect on the plaintiff resulting from the failure to receive the announcements involved. In support of its theory that plaintiff suffered little or no damaging effect as a result of the failure of defendant to deliver the announcements with which we are dealing defendant has offered evidence of the effect of the use of announcements under the conditions and circumstances involved here, and you may consider this evidence in arriving at the amount of damages plaintiff is entitled to recover for the breaches of contract involved here.

"Now, members of the jury, in arriving at the amount of damages, if any, plaintiff is entitled to recover, there is another principle of law of damages as to which the Court will charge you. This principle is that a party which has suffered a breach of contract may recover, for such breach, damages and only such damages as may reasonably be supposed to have been in contemplation of both parties, at the time they made the contract, as the probable result of a breach of it. In determining what damages can reasonably be said to have been in the contemplation of both parties, at the time they made the contract, as a probable result of the breach of it, you may consider all the facts and circumstances which have been admitted in evidence in this case, including all of the terms of the contract itself.

"Members of the jury, while the amount of damages a plaintiff is entitled to recover may not be based on speculation, guess or conjecture, at the same time in cases of this kind, the amount of damages suffered may be uncertain, but uncertainty as to the exact amount is no reason for denying recovery. The fact that the amount of damage may not be susceptible of exact proof or may be uncertain, contingent or difficult of ascertainment does not prevent recovery. The law does not require exactness of computation in suits involving questions of damages growing out of contracts. Damages are allowable where they are not in fact remote or speculative, and are proved to a reasonable certainty.

time. The fair and reasonable value of the television time was not an issue in this case. The net effect of all this undoubtedly influenced the jury to return a large verdict. RKO objected to this portion of the charge and also tendered a special request to charge which was denied.

In our judgment, the only fair measure of damages to be applied in this case is the formula agreed upon by the parties in the lease for annual cash rental. It represents what the parties thought at the time was the fair and reasonable rental value of the property payable in cash. This view is strengthened by the conduct of Interstate in reporting the rents computed in conformity therewith amounting to $9,600 annually in its federal income tax returns.

Using this formula, the computation of Interstate's damages becomes simple. Interstate received all but one third of the announcements to which it was entitled. Its damage for one year would be one third of $9,600 or $3,200 and for five years it would amount to $16,000. There was no evidence of other damages.

In our opinion, because of the provisions of the lease, Interstate was entitled to collect its reasonable counsel fees and expenses in the amount of $15,900. RKO did not dispute the reasonableness of the attorney's fees or expenses, but questioned its liability for the fees on the ground that there was no evidence of any obligation on the part of Interstate to pay for the same. The District Judge thought there was such evidence and submitted the issue to the jury. We think he was correct in so doing.

It follows that the verdict and judgment were excessive to the extent that they exceeded the amount of $31,900 which was the amount of Interstate's damages, attorney's fees and expenses. We do not find that the verdict was influenced by passion and prejudice.

In view of this disposition, it is unnecessary to pass upon the other errors claimed.

The judgment will, therefore, be reversed and the case remanded to the District Court for a new trial unless Interstate, within twenty days from the date hereof, remits from its judgment the sum of $134,000 and files the remittitur with the Clerk of this Court. If said remittitur is timely filed then the judgment will be affirmed in the amount of $31,900 with interest at 6% per annum from February 1, 1962.

No. 15,004.

United States Court of Appeals for the Sixth Circuit.

Interstate Life & Accident Insurance Company,
Plaintiff-Appellee,
vs.
RKO Teleradio Pictures, Inc.,
Defendant-Appellant.

ORDER ON PETITION FOR REHEARING.

Filed July 16, 1963.

Before: Weick and O'Sullivan, Circuit Judges, and Darr, Senior District Judge:

In our opinion on the merits we pointed out that appellee had waived any claim for loss of profits. It was, therefore, restricted to recovery of actual damages which it sustained by reason of partial breach of the lease. The only damages shown by the record were allowed to appellee by this Court. In so doing we adopted its computation as to the number of omitted announcements rather than the substantially smaller number claimed by appellant, although this issue of fact was in dispute.

The only new matter contained in the petition for rehearing is the claim that appellee is entitled to reimbursement for counsel fees and expenses incurred in the appeal. The trouble with this claim is that appellee lost in the appeal. In the District Court appellee was awarded $15,900 for attorneys' fees and expenses incurred in recovering damages which we have reduced to $16,000. We do not

think that the provision in the lease for payment of attorneys' fees can be construed to embrace legal services and expenses in prosecuting a claim held to be without merit. In any event, in our judgment, the award made in the District Court was ample to reimburse appellee for attorneys' fees and expenses incurred in the appeal.

The petition for rehearing is denied.

Paul C. Weick,
United States Circuit Judge.

In the District Court of the United States for the Western District of Tennessee, Western Division.

Interstate Life & Accident Insurance Company, Plaintiff, v. RKO Teleradio Pictures, Inc., Defendant.	Civil No. 3857

OPINION ON MOTION OF DEFENDANT FOR JUDGMENT NOTWITHSTANDING VERDICT OR FOR ORDER GRANTING NEW TRIAL.

Filed January 30, 1962.

This is a suit filed by the plaintiff, Interstate Life & Accident Insurance Company, against the defendant, RKO Teleradio Pictures, Inc., whose name thus appears in the captions of various pleadings though its correct name has been shown to be "RKO General, Inc.," seeking to recover damages for breach of contract, attorneys' fees and expenses. Under the written lease agreement, upon which suit was brought, plaintiff obligated itself to construct a building in the City of Memphis to be used by the defendant for a television station and, under the terms of the lease, defendant was to pay plaintiff, in lieu of cash rent, rent in kind in the form of spot television announcements which would advertise plaintiff's business.

The jury rendered a verdict in favor of the plaintiff as follows: For damages for breach of contract in failing to deliver the number of spot announcements required by the contract, $150,000; for attorneys' fees and expenses, $15,900.

At the trial the parties stipulated that expenses incurred by the plaintiff, which were reasonable, were $3,900.00, so that it is clear that the jury awarded damages for attorneys' fees of $12,000.00.

Defendant has made a motion for a judgment notwithstanding the verdict or for a new trial, and at the conclusion of oral argument of counsel the Court then overruled the motion with respect to all questions except the question of the propriety of the verdict with respect to attorneys' fees and has taken this aspect of the motion under advisement.

In brief, it is defendant's argument, in connection with the attorneys' fees, that under the lease agreement upon which the claim is based, plaintiff's right to recover attorneys' fees from defendant is only a right to be indemnified, and since plaintiff did not prove that it had actually paid or incurred attorneys' fees in connection with the litigation it should not have been allowed to recover them.

The relevant provision in the lease agreement, having to do with attorneys' fees, provided as follows:

> 21. Lessee further covenants to pay all reasonable attorneys' fees and expenses of the Lessor incurred in enforcing any of the obligations of the Lessee under this lease, or in any litigation or negotiation in which the Lessor shall, without his fault, become involved through or on account of this lease.

In the charge to the jury the Court simply instructed the jury in substantially the same language as that contained in the lease agreement insofar as the right of plaintiff to recover attorneys' fees was concerned.

Defendant has properly preserved its rights in that it generally denied in its answer that plaintiff was entitled to recover attorneys' fees under the circumstances; it

moved the Court at the conclusion of all of the evidence to withdraw the issue of attorneys' fees from the jury and to direct a verdict thereon for the reason that it had not been shown that plaintiff had obligated itself to pay any attorneys' fees to its attorney, and it submitted a special request for instructions to the jury to the effect that plaintiff was not entitled to recover any attorneys' fees because there was no proof of any obligation to pay such fees.

At the trial, plaintiff offered no evidence of an express fee agreement with its attorney, who was representing it at the trial and had represented it in connection with this controversy prior to the trial, and offered no evidence of the non-existence of an express agreement with its attorney with respect to fees. (If there were no express agreement, there would be, of course, an implied contract to pay a reasonable fee. **Newnan v. Washington**, 8 Tenn. 79 (1827)). As stated, it is defendant's insistence that, properly interpreted, the provision for attorneys' fees in the lease agreement is only an indemnity agreement so that plaintiff in no event could recover an amount in excess of that it had paid or incurred an obligation to pay. In the absence of evidence of the existence or the non-existence of an express agreement, the jury could not infer that plaintiff did not have an express agreement to pay a fee of less than $12,000, defendant argues.

In support of its claim for an attorneys' fee, plaintiff did offer as a witness a member of the bar of the City of Memphis who testified that he was generally familiar with the work done by plaintiff's attorney and the members of his firm, including the prior trial which resulted in a mistrial after five days, and that, in his opinion, a fee of $12,000 for the actual time consumed plus an additional 5% of any amount recovered would be a reasonable fee.

It is therefore apparent, from the amount of the verdict as to fees and expenses, that the jury awarded plaintiff, as damages for attorneys' fee, an amount which the proof had shown to be reasonable for the time consumed alone, and awarded no damages for additional fees based on the amount recovered. The Court believes that the amount so awarded, under all the proof, was extremely reasonable and does approve it.

Therefore the only question remaining is whether, as a matter of law, this verdict with respect to attorneys' fees is supportable by the evidence.

It would seem that, and the Court so holds, defendant is correct in its position that the provision with which we are dealing amounts only to an indemnity agreement, because it provides that plaintiff is entitled to recover only "... reasonable attorneys' fees and expenses of the Lessor **incurred** in enforcing any of the obligations of the Lessee' ..." (Emphasis ours). It is interesting to note that the few adjudicated cases which deal with this general problem do not clearly establish whether such an agreement should be treated as only an indemnity agreement and further whether, even assuming an indemnity agreement, it is necessary, to recover, actually to present evidence of the obligation to pay the attorneys' fee. Generally, the cases deal with three types of provisions: (1) an obligation to pay a reasonable attorneys' fee incurred in the enforcing of the obligations contained in the instrument; (2) an obligation to pay a percentage of the amount recovered in the event it is necessary to enforce; and (3) an obligation to pay a reasonable attorneys' fee in the event it is necessary to enforce. The first type of agreement is, analytically, an indemnity agreement, like the agreement in the case at bar, while the latter two types of agreements are not, and are really clauses giving the right to special damages.

Therefore, the real question in this case, since the Court interprets the provision as an indemnity agreement, is whether or not the jury should be allowed to infer from these facts and circumstances not only that plaintiff's attorney had been employed by plaintiff but also that, in the absence of any showing to the contrary, plaintiff was obligated to pay him a reasonable fee for his services.

In the case of **Farmers State Bank v. Haun**, 30 Wyo. 322, 222 Pac. 45, 50-51, **rehearing denied**, 31 Wyo. 201, 224 Pac. 856 (1924), the Court was dealing with a provision for a 25% attorneys' fee in the event the note was placed in the hands of an attorney for collection. This, it would appear, should be construed as a special damage rather than an indemnity provision, but the Court seems to treat it as if it were an indemnity provision. Nevertheless, it held that, where counsel appears and represents the plaintiff, it can be presumed not only that he had authority to so act but also that he had an express or implied agreement to receive reasonable compensation for his services.

In **Rychener v. McGuire**, 66 S. W. 2d 413, 414 (Tex. Civ. App., 1933), the note involved therein provided that if it were placed in the hands of an attorney for collection, the maker must pay 10% attorneys' fee. Again, it will be seen that this provision, properly construed, was a special damage rather than an indemnity provision, but the Court treated it as if it were an indemnity agreement. It held, however, that it would be presumed, in the absence of a showing to the contrary, that the attorney was entitled to receive at least as much compensation as provided for in the note. Compare, **Roberts v. Colt Co.**, 31 S. W. 2d 196, 198 (Tex. Civ. App., 1930).

In the case of **Marsh Wall Products v. Henry Marcus Building Specialties**, 162 Cal. App. 2d 371, 328 P. 2d 259, 264 (1958), it was the contention of the defendant that

the plaintiff should not be allowed to recover attorneys' fees, because the note involved therein provided for attorneys' fees reasonably incurred in enforcing payment of the note and that it had not been shown that plaintiff had obligated itself to pay or had paid its attorney any amount. However, the Court held that was not necessary and that, in effect, the trier of the fact could infer from the representation by the attorney that he had the right to a reasonable fee. Compare, **City Investment Co. v. Pringle**, 49 Cal. App. 353, 193 Pac. 504 (1920).

The rule in Florida seems to be otherwise, for the cases there seem to hold that, even where the agreement is clearly a special damage provision rather than an indemnity provision, it is still necessary, to recover attorneys' fees, to offer evidence of the actual obligation to pay. **North v. Villas**, 111 Fla. 560, 154 So. 245 (1934); **Sarasota Publishing Company v. Palmer & Co.**, 102 Fla. 303, 135 So. 520 (1931); **Realty Bond & Share Co. v. Englor**, 104 Fla. 329, 143 So. 152, 156 (1932); and **Dickerson v. First National Bank**, 101 Fla. 1137, 132 So. 835 (1931). However, in the **North** case, one judge, who concurred specially, felt obligated to do so because of the prior holding of the Florida court in the **Sarasota** case, and stated:

> "Why an attorney whose name is signed to a declaration on a note should have to make oath that he is not rendering his services in the case to the plaintiff gratis in order for plaintiff to recover his attorney's fee indemnity is to my understanding incomprehensible." 154 So. at 246.

See also, **Bish v. First National Bank**, 78 Colo. 326, 241 Pac. 527, 538-9 (1925); **Mulvihill v. First National Bank**, 80 Colo. 72, 249 Pac. 504 (1926); **Interstate Motor Freight v. Gasoline Equipment Co.**, 107 Ind. App. 494, 24 N. E. 2d 418, 420 (1940); **Porter v. Title Guaranty Co.**, 17 Idaho

364, 106 Pac. 299, 304 (1909); **Chapman & Smith Co. v. Crown Novelty Co.**, 175 Ill. App. 397 (1912). See generally: Annot., **Construction and Effect of Lease Provisions Relating to Attorney's Fees**, 77 A. L. R. 2d 735, 745; 12 **Am. Jur., Contracts**, § 185; 11 C. J. S., **Bills and Notes**, §§ 645h and 653.

Since under the general doctrine of the **Erie Railroad** case (304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487 (1938)), this Court should apply Tennessee law, including Tennessee conflict of laws, and since Tennessee would undoubtedly, in view of the fact that the lease contract was made and was to be performed in Tennessee, apply its own law, we would be governed by Tennessee authority if there were any in point. Cf. **Carolina Spruce Co. v. Black Mountain R. R.**, 139 Tenn. 248, 201 S. W. 770 (1917); **French Piano Co. v. Hollberg**, 130 Tenn. 650, 172 S. W. 298 (1914). However, the only case which has been cited in this connection by the defendant is **Julian v. American National Bank**, 172 Tenn. 632, 113 S. W. 2d 746 (1938), which is definitely not in point. Moreover, the Tennessee cases cited and relied on by plaintiff are also not in point, and the Tennessee statutory provision creating an attorney's lien (29 T. C. A., § 262), also relied on by plaintiff, obviously presupposes the existence of a contract obligation on the part of the client to pay a fee.

After full consideration of the entire matter the Court has concluded that there are facts and circumstances in the record in this case which should permit a jury to conclude that plaintiff was obligated to pay a reasonable attorneys' fee. Here we have a situation in which plaintiff's attorney appeared and tried this suit which consumed slightly more than two weeks in court; plaintiff offered a member of the bar as a witness who testified as to the amount of work done, including that in con-

nection with the prior trial, and gave an opinion as to the reasonable value of these legal services; and the president of the plaintiff corporation, while testifying at length and who was cross-examined at length, indicated at least inferentially that plaintiff's attorney was representing it under proper authority and testified to nothing which would indicate that he was not entitled to a reasonable fee for his services.

It is therefore the opinion of the Court that the motion of the defendant for a judgment notwithstanding the verdict or for a new trial should, in both respects, be overruled, and counsel will prepare and submit a proper order within five days.

Bailey Brown,
United States District Judge.